SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 997

ANTOINETTE COVIELLO,

Petitioner,

vs.

NEW YORK CENTRAL RAILROAD COMPANY,

A BODY CORPORATE.

BRIEF IN SUPPORT OF PETITION.

I.

Giuseppe Coviello was not engaged in interstate transportation.

The New Jersey Court of Errors and Appeals in holding that Giuseppe Coviello was engaged in interstate transportation at the time of his death decided that question contrary to the following decisions of this Court.

Chicago & Northwestern R. R. Co. v. *Bolle*, 284 U. S. 74;

Chicago & Eastern Illinois R. R. Co. v. *Industrial Commission*, 284 U. S. 296;

N. Y., N. H. & H. R. Co. v. *Bezue*, 284 U. S. 415.

In *Chicago & Northwestern R. R. Co.* v. *Bolle*, cited *supra*, the plaintiff was employed by the railroad to fire a sta-

tionary engine. This engine was utilized to generate steam for the purpose of heating the passenger depot, baggage room, and other structures and rooms used for general railroad purposes. The steam was also used to heat suburban passenger coaches while standing in the yard. Some of these coaches taken off of interstate trains were heated when necessary, before being taken up by other interstate trains. A way-car and bunk cars converted into stationary structures and occupied by some of the employees engaged in the track maintenance and bridge building departments, were likewise heated. Some of the steam was used to prevent freezing of a turntable that turned engines employed both in interstate and intrastate traffic. In the trial court the plaintiff recovered a judgment under the Federal statute. This judgment was reversed by this Court on the sole ground that the plaintiff's employment was not that of interstate transportation or work so closely related thereto as to be a part thereof. In the course of the opinion Mr. Justice Sutherland said (p. 78):

> "It will be observed that the word used in defining the test is 'transportation,' not the word 'commerce.' The two words were not regarded as interchangeable, but as conveying different meanings. Commerce covers the whole field of which transportation is only a part; and the word of narrower signification was chosen understandingly and deliberately as the appropriate term. The business of a railroad is not to carry on commerce generally. It is engaged in the transportation of persons and things in commerce; and hence the test of whether an employee at the time of his injury was engaged in interstate commerce, within the meaning of the act, naturally must be whether he was engaged in interstate transportation or in work so closely related to such transportation as to be practically a part of it."

At page 80:

> "Plainly, the respondent in the present case does not bring himself within the rule. At the time of receiving his injury he was engaged in work not incidental to transportation in interstate commerce, but purely incidental to the furnishing of means for heating the station and other structures of the company. His duty ended when he had produced a supply of steam for that purpose. He had nothing to do with its distribution or specific use. Indeed, what he produced was not used or intended to be used, directly or indirectly, in the transportation of anything. It is plain that his work was not in interstate transportation and was not so closely related to such transportation as to cause it to be practically a part of it. Certainly that work was no more closely related to transportation than was that of the employee in the *Harrington* case, who placed coal in the chutes for the use of locomotives engaged in interstate transportation; or that of the employee in the *Cousins* case, who supplied coal for heating the shop in which cars used in interstate traffic were repaired. The work of the employees in those cases and that of the respondent here are, in fact, so nearly alike in their lack of necessary relationship to interstate transportation, as to be in principle the same."

In *Chicago & Eastern Illinois R. R. Co.* v. *Industrial Commission*, cited *supra*, an employee of the railroad company in attempting to oil an electric motor while it was running, was injured. The railroad was engaged in both interstate and intrastate commerce. The motor furnished power for hoisting coal into a chute to be taken therefrom by and for the use of locomotive engines principally employed in interstate work. Proceedings were brought under the State law for compensation. The railroad contended the employee was engaged in interstate commerce and that the compensation commission was without jurisdiction. The commission awarded compensation and on review this Court af-

firmed the judgment, reversing two of its own previous decisions at the same time. It is interesting to note what this Court had to say as to its own cases, which it definitely overruled:

> "The contention that Thomas was employed in interstate commerce at the time of the injury, rests upon the decision of this Court in *Erie R. Co.* v. *Collins*, 253 U. S. 77, and *Erie R. Co.* v. *Szary*, 253 U. S. 86. In the *Collins* case the employee, at the time of his injury, was operating a gasoline engine to pump water into a tank for the use of locomotives engaged in both interstate and intrastate commerce. In the *Szary* case the duty of the employee was to dry sand by the application of heat for the use of locomotives operating in both kinds of commerce; and he was so employed when injured. In each case this Court held that the employee was engaged in interstate commerce at the time of the injury, within the terms of the Federal Employers' Liability Act.
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> "The only difference between those cases and this one is that here the work of the employee related to coal, while in the *Collins* case it related to water, and in the *Szary* case, to sand. Obviously, the difference is not one of substance and if the *Collins* and *Szary* cases are followed a reversal of the judgment below would result."

At page 299:

> "We are unable to reconcile this decision with the rule deducible from the *Collins* and *Szary* cases, and it becomes our duty to determine which is authoritative. From a reading of the opinion in the *Collins* case, it is apparent that the test of the *Shanks* case was not followed (see p. 85), the words 'interstate commerce' being inadvertently substituted for the words 'interstate transportation.' The *Szary* case is subject to the same criticism, since it simply followed the *Collins* case. Both cases are out of harmony with the general current of the decisions of this Court since the *Shanks* case, *Chicago & North Western Ry. Co.* v. *Bolle*, *ante*,

p. 74, and they are now definitely overruled. The *Harrington* case furnishes the correct rule, and, applying it, the judgment below must be *affirmed.*''

A consideration of the facts in the *Collins* and *Szary* cases overruled by this Court in the case of *Chicago & Eastern Illinois R. R. Co.* v. *Industrial Commission*, 284 U. S. 296, quoted from above, will show how parallel the facts are with the case at bar.

In *Erie R. R. Co.* v. *Collins*, 253 U. S. 77, the plaintiff operated a signal tower and water tank, the tower being used for the operation of trains in interstate and intrastate commerce. The tank was used for supplying the locomotives of the trains with water, which was pumped from a closeby well into the tank by a gasoline engine which the plaintiff operated. While engaged in starting this gasoline engine he was injured. It appeared that trains carrying interstate commerce ran daily and their engines were supplied with water daily at this station. This Court originally held that this was interstate transportation but overruled that decision and held it was intrastate transportation. If this employee attending to a gasoline engine which pumped water for use in interstate locomotives was not engaged in interstate transportation, then certainly the decedent in the case at bar, who furnished oil to the switch lamps and cleaned the lamps, was not engaged in interstate transportation.

In *Erie R. R. Co.* v. *Szary*, 253 U. S. 86, the facts showed that it was necessary to provide dry sand to locomotive engines of the defendant. The plaintiff was employed in its preparation, which was done in a small structure standing in the yards alongside of the track, called the 'sand house.' The drying of the sand was done in four large stoves which it was the duty of the plaintiff to attend. The ashes from these stoves had to be dumped at intervals in an ash pit nearby. After supplying sand to about seven

locomotives whose destinations were other states, Szary was carrying ashes from the stoves to the ash pit when he was injured. This Court originally held that this work was interstate transportation, but overruled that decision and held that it was intrastate transportation. If the removal of the ashes from these stoves which dried sand for interstate engines was too remote to be considered interstate transportation, then the decedent in the case at bar in supplying oil to the switch lamps and cleaning those lamps was too far removed from interstate transportation to be a part thereof and come under the Federal Act.

In *New York, New Haven & Hartford R. R. Co* v. *Bezue*, cited *supra*, the railroad maintained at one of its termini, a roundhouse, a machine shop, a carpenter shop and a so-called hoist building. These facilities were used largely for servicing and repairing locomotives used in interstate transportation. The employee worked as a member of a general unskilled labor gang at this terminal. His principal work was the operation of an electric truck with which he transported materials from one portion of the plant to another. He also assisted in various minor repairs to engines brought into the terminal. On the day of the accident he was helping to remove a pair of main driving wheels from the lathe in the hoist building and rolling them to the engine pit in the yard. These wheels were to be installed on a locomotive. In holding that the employee was not engaged in interstate transportation and therefore did not come under the Federal statute, Justice Roberts said p. 419):

> "The state Court held that the terminal facilities in which respondent worked constitute a part of the railroad's system necessary to the operation of the road and to the conduct of interstate commerce; that the fact that some work is there done on locomotives engaged in intrastate commerce does not deprive the establishment of its character as an essential instrumentality of

interstate commerce; that the respondent was engaged in a 'plant service' and worked indiscriminately upon engines engaged in interstate and intrastate commerce. The conclusion was that the nature and purpose of the plant warranted characterization of all respondent's work, of whatever nature, as in interstate commerce.

"The test thus applied is broader than our decisions justify. All work performed in railroad employment may, in a sense, be said to be necessary to the operation of the road. The business could not be conducted without repair shop employees, clerks, janitors, mechanics, and those who operate all manner of appliances not directly or intimately concerned with interstate transportation as such, or with facilities actually used therein. But we have held that the mere fact of employment does not bring such employees within the act."

The decision of the New Jersey Court of Errors and Appeals in the case at bar is contrary to prior decisions of that court and of several United States Circuit Courts.

In *Martin* v. *Central R. R. Co. of N. J.*, 116 N. J. L. 162 (reversing 115 N. J. L. p. 11), the New Jersey Court of Errors and Appeals following *Chicago & Northwestern R. R. Co.* v. *Bolle*, 284 U. S. 74, held that an employee was not engaged in interstate transportation under the following facts. The employee was a painter working for the railroad. While repairing the skylight on the roof of the terminal train shed of the railroad, he sustained a fall through the skylight, which caused his death. The train shed was used by both interstate and intrastate trains.

In *Fury* v. *New York and Long Branch R. R. Co.*, 126 N. J. L. 25, 16 Atl. (2d) 544, the New Jersey Court of Errors and Appeals held that an employee was not engaged in interstate commerce under the following facts: The employee was a signal maintainer employed by the railroad, with working hours from 8 A. M. to 5 P. M. He was under constant duty to inspect and repair signal equipment at a tower and substation. After 5 P. M. on the day of the

accident he went to the substation and made repairs which took about one hour. He was on his way home, walking along the company's tracks, when injured.

In *Louisville & N. R. Co.* v. *Brittain*, 93 Fed. (2d) 159 (5th C. C. A.), the question decided was stated by the court in its opinion as follows (p. 160):

> "The sole point urged is that, as matter of law, what plaintiff was admittedly engaged in doing, to wit, hauling timbers to replace unsound sills, and to close in the space under the platform of the non-agency station at Blount Springs, was not transportation, nor was it work so close to it as to be practically a part of it."

In concluding that the employee was not engaged in interstate transportation the court said (p. 162):

> "* * * As we read and understand the Supreme Court decisions, written since the *Pedersen* case, and especially those most recently written, they hold that while a repairman, injured while engaged in making repairs upon instrumentalities used in interstate commerce, may conceivably be under the act, he will be held to be so only when those repairs are not remotely but directly an essential part of transportation as motion or action. When the work is upon an object which, as relates to transportation, is static in its nature, and is particularly static when the work in question is performed upon it, though that object may, before the work was done, have been useful and used in interstate commerce, and is to continue so, indeed, though the work was done upon it to make it so, such repairs are of course not transportation, neither are they so close to it as to be a part of it, and the repairman injured while doing them is not within the act."

In *Poff* v. *Washington Terminal Co.*, 69 Fed. (2d) 572, it was held that an employee removing a cylinder head of an ammonia pump in the terminal company's plant for supplying ice used in its passenger station, refrigerator cars, and refrigeration uses generally was not engaged in interstate commerce.

In *Pennsylvania R. R. Co.* v. *Manning*, 62 Fed. (2d) 293 (3d C. C. A.), a railroad employee, who, at the time of injury, was fixing an electrical motor which furnished power to a crane used in loading and unloading cars containing both interstate and intrastate freight, was not engaged in interstate commerce. The Court pointed out that his work was merely incidental to the work which the crane did and was not work in interstate transportation so as to come under the Federal Act.

The New Jersey Court of Errors and Appeals consists of sixteen members. They are the Chancellor, Chief Justice of the New Jersey Supreme Court, nine associate Justices of the Supreme Court, and seven judges, specially appointed. Three Justices of the New Jersey Supreme Court held that Coviello was not engaged in interstate transportation when this case was before that Court. These Justices were then disqualified from passing on the question when this cause was before the Court of Errors and Appeals. The Court of Errors and Appeals decided that Coviello was engaged in interstate transportation by a vote of seven to six. Therefore, petitioner had a majority of the entire court (nine to seven) decide the question in her favor, but nevertheless, lost the case.

Conclusion.

For the foregoing reasons we respectfully submit that this Court should grant a writ of certiorari to review the final judgment of the New Jersey Court of Errors and Appeals.

Respectfully submitted,

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Attorney of Petitioner.